STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1310

State of Minnesota,
Respondent,

vs.

Sean Brown,
Appellant.

Filed January 15, 2008
Affirmed
Klaphake, Judge

Hennepin County District Court
File No. 05070611

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Michael O. Freeman, Hennepin County Attorney, Jean Burdorf, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

John M. Stuart, State Public Defender, Lydia Villalva Lijo, Assistant State Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Klaphake, Presiding Judge; Shumaker, Judge; and Worke, Judge.

U N P U B L I S H E D O P I N I O N

KLAPHAKE, Judge

Appellant Sean Brown challenges his conviction for first-degree and second-degree assault, arguing that the district court abused its discretion by permitting the

prosecution to strike the only African American male juror, erred in permitting the state to ask appellant on cross-examination whether the state witnesses were "mistaken," and erred in allowing the state to amend the complaint just prior to commencement of the jury trial.

Because (1) the record supports the district court's decision permitting the state to strike the juror; (2) the district court erred in permitting the state to improperly question appellant on cross-examination, but it was harmless error; and (3) the state can amend its complaint prior to the commencement of trial, we affirm.

D E C I S I O N

I. Batson Challenge

Appellant argues the district court erred by denying his *Batson* challenge to the state's peremptory strike of the "only African-American male" juror. The use of peremptory challenges to exclude potential jurors solely on the basis of race violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719 (1986). "Whether there is racial discrimination in the exercise of a peremptory challenge is a factual determination to be made by the district court and is entitled to great deference on review." *State v. Taylor*, 650 N.W.2d 190, 200-01 (Minn. 2002). The decision will not be reversed unless it is clearly erroneous. *Id.*

Minnesota applies the *Batson* three-step analysis: (1) first, the party opposing the challenge must make a prima facie showing of racial discrimination—an inference that the juror's exclusion was based on race; (2) the burden then shifts to the party wishing to

strike the juror to provide a race-neutral explanation; and (3) if a race-neutral reason is offered, the court must decide if the reason is pretextual or if the opposing party has proven purposeful discrimination. *State v. Blanche,* 696 N.W.2d 351, 364-65 (Minn. 2005) (citing *Purkett v. Elem,* 514 U.S. 765, 767, 115 S. Ct. 1769, 1770-71 (1995)). "The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *State v. Bailey*, 732 N.W. 2d 612, 618 (Minn. 2007) (quoting *Purkett,* 514 U.S. at 767-68, 115 S. Ct. at 1779).

The Minnesota Supreme Court has recognized that race-neutral explanations do not need to be "persuasive, or even plausible." *State v. Reiners,* 664 N.W.2d 826, 832 (Minn. 2003). Rather, the explanation will be deemed race-neutral "[u]nless a discriminatory intent is inherent in the [party's] explanation." *Purkett*, 514 U.S. at 768, 115 S. Ct. at 1771 (quotation omitted).

In the present case, on examination by the trial court, the only African American male juror, C.O., stated that his mother had been wrongly arrested for prostitution about 10 years before and that he felt she was treated unfairly. The court successfully tried to rehabilitate this juror, as the juror said he could be fair and impartial despite this experience. Later, without further questioning of juror C.O., the state asked to use its peremptory challenge to dismiss this juror; appellant objected, requesting a *Batson* analysis.

The first step—a prima facie showing of racial discrimination—was waived by the prosecution. When asked to explain its reason for the strike, the state explained it wanted to strike juror C.O. for strategic reasons because the juror may "hold a grudge against the

system" and because the juror has "very hard feelings" about "a loved one, in particular a mother in this case, [who] has been wrongfully charged because she was in the wrong place at the wrong time."

The district court accepted the state's race-neutral reason for seeking the peremptory challenge. Defense counsel then argued the state's reason was pretextual because (1) the prosecutor failed to ask any further questions of juror C.O., and (2) the prosecutor failed to strike other jurors who were "similar" because they had been charged with crimes or had criminal convictions. The prosecution responded that it did not want to further question juror C.O because further questioning may alienate the rest of the jury. The district court rejected defense counsel's argument that the prosecutor was required to question the juror about his alleged "grudge" against the system. In denying the *Batson* challenge, the district court found that the prosecution's stated reason was a "reasonable thing within the realm of what intelligent lawyers would do in this situation." We agree. The state's given race-neutral reason for dismissing juror C.O. is reasonable and plausible in light of this record.

We now turn to whether the prosecution's stated reason is merely pretext or if appellant has shown purposeful discrimination. Appellant again argues on appeal that the state's stated reason for striking juror C.O. is pretextual because the state did not move to strike other potential jurors who had been charged with or convicted of crimes. Purposeful discrimination may be shown if a prosecutor's proffered reason for striking an African American panelist applies just as well to other similarly situated non-African

American jurors who are not stricken. *Miller-El v. Dretke*, 545 U.S. 231, 241, 125 S. Ct. 2317, 2325 (2005). The record does not support appellant's argument here.

Of the twelve jurors seated, two had been convicted of a crime and four had relatives or friends who were convicted of a crime, but all stated they felt that they had been treated fairly by the justice system. Only two jurors indicated that they or a relative had been "falsely" or "unjustly" accused of a crime: juror S.P., a Caucasian male, and juror C.O., an African American male, and both were stricken by the prosecution. Juror S.P. stated he was wrongfully charged with two traffic violations and was acquitted at trial. The prosecutor asked juror S.P. if he had a "grudge" against the system from this experience, and he responded "no." C.O., an African American male, stated his mother had been improperly arrested for prostitution and that she had been treated unjustly. The prosecutor exercised two peremptory challenges against both the Caucasian juror S.P. and the African American juror C.O. on the grounds that these jurors may have a "grudge" against the system. This record supports the district court's determination that there does not appear to be any discriminatory intent inherent in the state's explanation that it dismissed the potential juror because his mother had been treated unfairly by the criminal justice system.

While the trial record does refer to C.O. as the sole African American *male* panelist, the record is not clear as to the actual make up of the rest of the jury panel. Because the record is not clear on this issue, the district court was in the best position to observe the juror's responses and view the ethnic makeup of the jury panel. *See State v. Pendleton*, 725 N.W.2d 717, 724 (Minn. 2007) (great deference given to the district court

on a *Batson* challenge and "recognizing that the record may not reflect all of the relevant circumstances that the court may consider"). Likewise, this record does not support a finding of purposeful discrimination because the prosecution chose not to question juror C.O. directly. The strategic decision to not actively question a potential juror and risk alienating a jury does not by itself support a finding of purposeful discrimination.

There is sufficient basis for the district court's ruling that there was no discriminatory intent in the decision made by the state and that the state's reasons were not pretextual. The district court did not clearly err in rejecting appellant's *Batson* challenge to the state's use of a peremptory strike against juror C.O.

II. Prosecutorial Misconduct: "Were They Mistaken" Questions

Appellant also claims he was denied a right to a fair trial based on prosecutorial misconduct because the prosecutor asked him during cross-examination to comment on whether the state's witnesses were "mistaken." When reviewing alleged prosecutorial misconduct, the court should not reverse unless the alleged misconduct, when viewed in light of the whole trial, impairs appellant's right to a fair trial. *State v. Morton*, 701 N.W.2d 225, 233 (Minn. 2005). A new trial will not be granted if the misconduct was "harmless beyond a reasonable doubt," that is "if the verdict rendered was surely unattributable to the error." *Id*. (quotation omitted). Moreover, "[r]ulings on evidentiary matters rest within the sound discretion of the [district] court, and we will not reverse such evidentiary rulings absent a clear abuse of discretion." *State v. Sanchez-Diaz*, 683 N.W.2d 824, 835 (Minn. 2004) (quotation omitted).

In Minnesota, "[a]s a general rule, 'were they lying' questions have no probative value and are improper and argumentative because they do nothing to assist the jury in assessing witness credibility in its fact-finding mission and in determining the ultimate issue of guilt or innocence." *State v. Pilot*, 595 N.W.2d 511, 518 (Minn. 1999).

Appellant argues that the prosecutor's conduct in asking him "were they mistaken" questions during cross-examination constituted prosecutorial misconduct. We agree. On cross-examination, the prosecutor was permitted to ask appellant repetitive questions regarding whether the state's witnesses were mistaken:

> Q: Mr. Brown, when Dominique testified that on that, during the phone call you threatened to kill the entire family –
> A: No, I didn't.
> Q: When he testified that you told him, made the threat to kill the entire family, he was mistaken; is that correct?
> A: I didn't say that to him.
> Q: Mr. Curry testified that you . . . talked on the telephone later that day; . . .
> A: We did not.
> Q: So when Mr. Curry said that you did, he was mistaken?
> A: We didn't talk.
> Q: When he testified that you threatened to air out the place, 1901 Morgan, he was mistaken?
> A: He did not say that.
> Q: When [Mr. Curry] testified that it was you who pointed a gun at him and pulled the trigger and shot him, he was mistaken?
> A: I believe so.
> Q: When Carol Curry testified that it was you who pointed at her brother Leroy and shot him, she was mistaken?
> A: Yes, she was.
> Q: When Jevin Reynolds, Justin Reynolds, Jason Reynolds testified that it was you at the tree at the front of their cousin Leroy [sic], they were mistaken?
> A: Yes.

The manner and nature of this line of questioning is argumentative and improper. Repeated inquiry as to whether appellant believed the state's witnesses were mistaken or wrong does not assist the jury in its determination of the facts or the credibility of the witnesses. The prosecution should not be permitted to use cross-examination as a closing argument by making the defendant repeatedly comment on the truthfulness of the other witnesses. Under the facts of this case, the court abused its discretion in permitting the "were they mistaken" line of questioning.

The prosecutor first asked appellant whether the state's witnesses were "lying or mistaken." Upon appellant's objection, the district court restricted the prosecution to ask only if the witnesses were "mistaken." In the context of this case, the word "mistaken" is no different than "lying" in the manner used by the prosecution—both inquiries ask whether the witness is telling the truth. *See Morton*, 701 N.W.2d at 234-35 (questioning that pertains to whether the witness is telling the "truth" constitutes error). Rephrasing the question from "lying" to "mistaken" did not change the fact that this line of questioning was simply argumentative and improper.

Because there was prosecutorial misconduct, we must decide whether the misconduct constituted harmless error. If the verdict in this case is "surely unattributable" to the error, then the error is harmless beyond a reasonable doubt. *State v. Keeton*, 589 N.W.2d 85, 91 (Minn. 1998). Here, there is substantial evidence on the record from which the jury could have found appellant guilty of the charges apart from the alleged misconduct. Numerous witnesses corroborated the shooting victim's account of the events implicating appellant as the assailant. In consideration of the entire record,

the jury's verdict was surely unattributable to any prosecutorial misconduct. Thus, appellant was not denied his right to a fair trial.

III. Amendment of the Complaint and Ineffective Assistance of Counsel

In his pro se supplemental brief, appellant argues that the district court abused its discretion by permitting the prosecutor to amend the criminal complaint to include two additional charges and that he was prejudiced by the fact that the jury convicted him solely on the additional charges and acquitted on the original charge.

Minn. R. Crim. P. 3.04, subd. 2, permits the state to amend the complaint any time prior to the commencement of trial. *See State v. Bluhm*, 460 N.W.2d 22, 24 (Minn. 1990) (trial court is relatively free to permit amendments to charge additional offenses before trial is commenced, provided the court allows continuances where needed); *see also State v. Guerra*, 562 N.W. 2d 10, 12 (Minn. App. 1997). Once trial has commenced, amendment is only permitted if a defendant agrees or if no additional or different offense is alleged and if defendant's rights are not thereby prejudiced. *Id.* at 12-13; Minn. R. Crim. P. 17.05. This court should not disturb the district court's ruling unless it finds an abuse of discretion. *State v. Gerdes*, 319 N.W.2d 710, 712 (Minn. 1982).

Here, the state filed the initial complaint charging attempted first-degree premeditated murder against appellant on November 4, 2005. The trial on that offense was scheduled to begin February 21, 2006, but appellant requested a two-week continuance. Prior to the commencement of the trial on March 6, the court permitted the state to amend its complaint to include two additional charges, first- and second-degree assault. Defense counsel did not object to the amendment, stating the additional charges

would not affect the theory of defense or strategy that defendant did not commit the offense and was not at the scene of the crime. Thereafter, the jury was selected and sworn in.

Here, the district court did not err when it allowed the state to amend the complaint prior to jury selection on March 6, 2006. *See Bluhm*, 460 N.W.2d at 24 (trial commences when jeopardy has attached). The trial had not commenced, and Minn. R. Crim. P. 3.04, subd. 2, permits the amendment, provided the trial court allows a continuance if needed. Appellant did not ask for a continuance. Nor has appellant shown he was prejudiced by a failure to continue the trial.

Appellant further alleges ineffective assistance of counsel from his trial attorney because defense counsel failed to object to the amendment of the complaint. There is a strong presumption that counsel's performance falls within a range of acceptable professional conduct. *State v. Gustafson*, 610 N.W.2d 314, 320 (Minn. 2000). In order to succeed on this claim, appellant must show that the defense counsel's performance was deficient and that he was prejudiced thereby. *Id*.

Because the district court correctly permitted the state to amend the complaint, defense counsel's failure to object is not a sufficient basis to establish ineffective assistance of counsel.

Affirmed.